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Friday, February 22, 2008

Unbundled jurisdictions and exit costs

Standard political "science", on which both academic and popular modern views of politics are now based, has beat into our heads a false dichotomy: "government" vs. "anarchy." The first, it is assumed, is sovereign government: it has a "monopoly of force." The second is often viewed as either an imaginary world of violent lawlessness or an imaginary world of purely voluntary relationships.

But this excludes what much of the politics and law of England and its colonial offshoots, among many other examples, were for most of their history: divided, non-sovereign governments. Law enforcement with no monopoly of force. There are a number of kinds of such division -- the most familar being federalism and the separation of powers. But the most interesting of all is the unbundling of political property rights.

I have explained why law generally cannot be enforced by purely voluntary relationships. Sure, most rules, formal and informal, of society can be and are followed in a largely voluntary fashion. Reputation and other factors can provide incentives to follow many kinds of rules. But when either the threat or the response become violent or overly fraudulent real law, i.e. law based on local initiations of force, is generally required. Murray Rothbard's fallacy was to try to extend a general principle that succinctly summarizes the substantitve common law -- non-initiation of force -- to the procedural law, which it does not properly summarize and where it mostly does not belong.

Defining "government" as any relationship that is not purely voluntary, what forms of such "government" maximize liberty by minimizing exit costs? Unbundled political property rights put the lie to the "monopoly of force" by unbundling the use of force into a wide variety of specialized forms -- each owned by a particular organization or individual. Here, for example, are some examples of political property rights from medieval and Renaissance England:

> There were dozens of standard jurisdictional franchises. For example, "infangthief" enabled the franchise owner to hang any thief caught red-handed in the franchise territory, whereas "outfangthief" enabled the owner to chase the thief down outside the franchise territory, catch him red-handed, and then hang him. "Gallows" enabled the owner to try and punish any capital crime, and there were a variety of jurisdictions correponding to several classes of lesser offenses. "View of frankpledge" allowed the owner to control a local militia to enforce the law. "The sheriff's pleas" allowed the owner to hear any case that would normally be heard in a county court. There were also franchises that allowed the collection of various tolls and taxes.

About Me

Nick Szabo

"A premier thinker about history, law and economics, and the lessons they have for security." -- Adam Shostack, Emergent Chaos

"Szabo comes out with these essays that leave me in awe." -- Brian Dunbar

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Modern remnants of such jurisdictions include the shopkeeper's privilege to arrest and imprison shoplifters, "stand your ground" statutes which recapitulate the traditional political property right, liberty of house, citizen's arrest, and so on. Even such a behemoth as the United States has nothing resembling a "monopoly of force."

Political property rights are narrowly defined rights to initiate force -- in very specific ways and in response to specific events and no others. Their legal exercise generally requires the owner to scrupulously follow specific procedures. Unbundled political property rights can reduce exit costs far more than sovereign governments, because they don't come bundled with the power to exclude normally associated with sovereignty and real property (much let the power to prevent people from leaving exercised by the more tyrranous sovereigns). It is thus possible to have a wide variety of jurisdictions enforcing law without any restrictions on the freedom of travel of those acting within the law. But unbundled political property rights do radically violate the nonsensical poli-sci dichotomy of sovereign government vs. anarchy that is taught in schools. Unbundled political property rights are neither sovereign government nor purely voluntary. But they are a crucial part of a world that maximizes liberty.

(This post is expanded from comments I made at Unqualified Reservations).

Posted by Nick Szabo at 2:01 PM

13 comments:

Michael S. said...

Nick, I have responded to your comment on UR about infangthief and outfangthief.

I believe that the right of "(pit and) gallows" at least under Scots law did not enable the baron court to try "any capital crime" Ordinary baronies could punish thieves, but the pleas of the crown, i.e., cases of murder, rape, etc., had to be tried in crown courts unless the baron was also a lord of regality. Most great magnates were, and this enabled them to reign almost as princes over their feus.

3:11 PM

George Weinberg said...

I'm still having some trouble wrapping my head around these ideas, they're so different from the way I'm used to thinking about things. For example, the idea that someone can own as transferable property the right to license medical practitioners in a region feels wrong to me, because my libetarianish instincts say if there's a willing service provider and a willing buyer a third party doesn't have a right to interfere. There's also a legitimate question as to how good a job they'd do. If there were multiple competing licensing agencies I can see how they would compete on reputation, but if just one has a local monopoly I can imagine he might license any quack willing to pay his fee.

3:22 PM

nick said...

I'm still having some trouble wrapping my head around these ideas, they're so different from the way I'm used to thinking about things.

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George, it is a sad fact that modern culture engrains the fraudulent sovereign government vs. anarchy dichotomy so deeply into our heads that it's hard to imagine anything else. When I started realizing what was going on in these old court cases it seriously blew my mind. It's a radically different political paradigm that our culture has utterly forgotten. I don't know of any history or political science one can read from the 19th or 20th centuries that carries even a hint that the author is familiar with this paradigm. Even the stuff written about medieval and colonial era law takes an anachronistically sovereigntist view -- the authors do not understand any other way of seeing things. Modern law assumes that "property" is merely economic and substantive, quite distinct from procedure. I only discovered the paradigm of political property rights by reading ancient court cases and recognizing the basic property-law structure of ancient legal procedure.

the idea that someone can own as transferable property the right to license medical practitioners in a region feels wrong to me

I'm not advocating a wholesale return to all the particular historical franchises. Indeed, I'm not advocating a return to the purely economic franchises at all. I'm against the franchises that were just legally enforced monopolies, where, as you say, economic competition is preferable.

I am rather advocating a rebirth of the political property rights view of law and politics, and that we should experiment with a wide variety of political property rights. Political property rights are rigorously defined rights to coerce one's fellow humans in certain very particular ways, following procedural rules. Eventually, political property rights could replace sovereign governments and the open-ended coercive powers they have so often abused.

With coercive powers, competition is usually a bug rather than a feature. For example, let's say we have unlimited entry for tax collectors: any person can collect up to 10% of anybody else's income. Your fellow citizen-collectors would end up taking practically 100% of your income -- far higher than the Laffer maximum. By contrast, a rational monopolist tax collector will just collect the Laffer maximum. Read what Mancur Olson has to say about roving vs. stationary bandits for more on this.

Nevertheless, I'm not averse to contractually created law where it can work. It mostly can work in contract, marriage, and other relational areas of law. However it mostly cannot work in areas of tort, property, and criminal law. For those areas, contract-based law must be at least supplemented with certain very limited political property rights -- for example rights to subpoena tort defendants, witnesses, and juries, rights to arrest and punish criminals, and so on.

Michael, I again appreciate your Scots law perspective. "Pleas of the crown" were generally a separate franchise under English law also. By the 17th century there was a very long list of capital offenses.

2:37 PM

nick said...

George, (and anybody else), since I don't know what particular things about political property rights confuse people, it would be helpful if you prepare a question or a short list of questions about them. A question might be a hypothetical ("what happens if X?"), it might be definititional ("what does Y mean?"), or any other kind of question. The process of preparing the questions, as well as of me thinking about and answering them, would I suspect clarify things greatly.

2:49 PM

George Weinberg said...

It's still pretty unclear to me how things would work in general. I get the impression that the old forms of legal property were nonstransferable and the owner couldn't even alter the rules of succession, but maybe that's wrong. I get the impression the new ones would be transferable and would probably be held by corporations rather than individuals.

Let's say that I own the right to execute capital criminals within San Mateo county. Presumably I don't have anything to do with apprehending or convicting criminals (unless I happen to own thsoe rights also). Does that mean someone has to pay whatever fee I charge or the felons remain unexecuted? Or can they just be shipped over to Alameda and executed there?

Really what worries me is that, since we're talking about doing things that are by nature coercive, and I think are local monopolies, it's not clear where the incentive to do a good job and keep fees low comes from.

5:09 PM

nick said...

I get the impression that the old forms of legal property were nonstransferable and the owner couldn't even alter the rules of succession, but maybe that's wrong.

To oversimplify, one could usually sell, but not mortgage or alter inheritence by will franchises. When, as was often the case, they were attached to ("appurtenant" as we say in property law) another property, they were governed by any alienability restrictions on that property. They often becamed partitioned under inheritence (with the strange effect that women often got the franchises as their share and the oldest son got the real property -- this under the now obsolete primogeniture laws).

I get the impression the new ones would be transferable and would probably be held by corporations rather than individuals.

We'd need to experiment to see what works, but generally speaking yes.

Let's say that I own the right to execute capital criminals within San Mateo county. Presumably I don't have anything to do with apprehending or convicting criminals (unless I happen to own thsoe rights also). Does that mean someone has to pay whatever fee I charge or the felons remain unexecuted? Or can they just be shipped over to Alameda and executed there?

Good question, thanks.

Franchises are a legal monopoly and their fees are capped by juries to allow for "reasonable" profits only. Whether they can be shipped to Alameda county depends on whether the monopoly is over executions conducted _within_ San Mateo county or is over executions for crimes committed in San Mateo county. We should prefer the former, more competitive solution unless the competition would cause (as in the tax case) more problems than it solves.

2:29 PM

nick said...

BTW, there were often restrictions on sales of franchises. In many cases, one had to get permission of the grantor (often the king or higher lord) to further grant (sell or give away) the property. The general idea (as with the ban on selling the Crown itself) is that for coercive franchises market efficiency is not the main goal, and often nothing like that is possible. The main goal is to properly regulate and contain a coercive monopoly. So we shouldn't expect to use the same property rules we apply to modern economic property, where the main goal is market efficiency. I think we should consider requiring jury approval of franchise sales.

I wrote:
We should prefer the former, more competitive solution unless the competition would cause (as in the tax case) more problems than it solves.

In this example one must guard against the cut-rate cruel-and-unusual death penalty. There are three general ways to guard against such problems:

(1) require all death penalty franchises to follow procedures banning cruel and unusual methods of execution (this restriction is simply part of the generic definition of the property right),

(2) write procedural rules into the particular grant banning cruel and unusual punishments, or

(3) allow local juries to add restrictions to the local franchises.

Methods (2) and (3) get undermined if there is competition with cut-rate franchises not burdened by such restrictions, and so only works if there if the franchise is monopolistically over capital crimes committed within San Mateo County, but method (1) allows for competitive franchises since they all must operate under the restriction.

We can't, as we do with economic property and market competition, rely on normal common law to prevent abuse, as the whole idea of a franchise is a property right to violate, under certain conditions and following certain procedures, what would otherwise be banned under the common law -- i.e. to commit theft (distraint of goods and taxes), kidnapping (arrest and summons to appear), killing (execution), etc.

To allow competition we must envision every major possible abuse of such a coercive power ahead of time and write it into the charter (property deed for the franchise). If we know we can't do this, we have to go with as monopolistic a solution as possible.

N.B. breach of procedure that harms the defendant is a trespass against the defendant (a wrongful death lawsuit), and that harms another franchise owner's property rights is a trespass against that franchise owner. Repeated violations could also be grounds for a _quo warranto_ proceeding where the franchise escheats to its grantor. (The latter conditions are written into the franchise deed as conditions on use of the franchise, much as is often done with real property).

3:08 PM

George Weinberg said...

Ok, so we've got two important defenses against abuse. Who are these juries and how are they formed? I assume they're not just twelve people chosen at random.

I have another question: over at UR I assumed the same entity would command the army as settle jurisdiction disputes because if someone refused to accept someone else's judgement over his jurisdiction the army would have to be called in to enforce the decision, and maybe that's not true, but it brings to mind another concern. It seems to me that no matter who is allegedly allowed to do what, there's always the risk that whoever commands the army will be able to do as he pleases. I get the impression that in long established societies (like the USA) it's fairly clear what the commander is and is not allowed to do, and the army would refuse to follow a clearly illegal order. But I think in new or unstable societies the army is often pretty much loyal to the commander as an individual. I was wondering if you have any particular ideas how to keep an excessively assertive military commander in check.

5:21 PM

nick said...

George: *there's always the risk that whoever commands the army will be able to do as he pleases...But I think in new or unstable societies the army is often pretty much loyal to the commander as an individual. I was wondering if you have any particular ideas how to keep an excessively assertive military commander in check.*

My ideas for this are not nearly as mature as my ideas for the legal system, but let me throw out some ideas to chew on:

(0) The right to bear arms is a political property right. For example, the right to build and deploy nuclear weapons, if it is allowed at all, is a political property right that is probably held by only one or a few entities.

(1) Except for prescriptive political property rights, political property rights can only by granted by a democratically elected Originating Congress that originally holds all non-prescriptive rights, but can exercise none. It can only define political property rights (rather like the Patent Office) and (unlike that body) distribute them only by lottery or auction. Note that the Originating Congress does _not_ have a general power of legislation, it only has a power to define and grant political property rights.

(2) Armies can only operate both effectively _and_ legally to the extent that they own the property rights to wield weapons advanced

enough for them to win.

(3) Individuals have a prescriptive political property right to be armed for self-defense and to exercise liberty of house, with the same kind of (but not substantially superior) arms to their potential aggressors. Thus, if it's significantly common for home invasion robbers to wield AK-47s, homeowners have a right to wield AK-47s to exercise liberty of house, but if the worst weapons commonly used are shotguns, they can own nothing substantially superior to shotguns. If an army with the advanced weapons starts illegally attacking the populace, said victims gain the legal right to use army-style weapons in defense of themselves and their residences.

(4) Killing any enemy combatant falls under the laws of war, but collateral damage is (at least) negligent homicide, and illegal as such, regardless of whether one is "at war", but a jury of people chosen from the location of the deaths may excuse it under a public necessity defense.

(5) The initial allocation of these property rights is prescriptive, i.e. starting on "day one" every existing armed force has the right to wield what they wield right now, but only if they agree by treaty to wield them only in execution of settling jurisdictional disputes according to the law of politcal property rights. But they don't have the right to develop new classes of weapons unless granted such.

(6) Mutineers do not inherit the political property rights of organizations they take over. They become outlaws.

(7) Breach of the boundaries of these military property rights is a trespass, possibly of a criminal nature, and flagrant breach can result to escheat of these rights to grantor under _quo warranto_, just as with other political property rights.

(8) Contempt of the verdicts of a court adjudicating these political property rights results in outlawry and is a declaration of war against all law-abiding wielders of political property rights.

1:05 PM

Daniel A. Nagy said...

Interesting discussion. I'm wondering whom Nick means, when he writes "we" and how (and where) does he propose to conduct experiments with such things?

8:04 AM

nick said...

Daniel, by "we" I mean what other people mean by the phrase, that is the group of people who agree with me. :-)

Incidentally, there have been two major sources of political power (whether characterized as a property right or otherwise in history):

(1) right of conquest, e.g. to pillage and plunder. Euphemism: none; in the Middle Ages lawyers were honest and called it "right of conquest."

(2) right of mob rule, e.g. to loot and lynch. Euphemism: "the will of the people." This is what many people mean these days when they say "we" and I share Daniel's concern about it.

Legal systems and (outside of violent anarchies) political systems, and indeed all real property, have always been based on these origins.

1:57 PM

nick said...

(1) right of conquest, e.g. to pillage and plunder. Euphemism: none; in the Middle Ages lawyers were honest and called it "right of conquest."

In more recent times, though, we've had euphemisms like "the divine right of kings."

It doesn't pay to delve too far back into titles to political power or real property. If you do, you'll find yourself agreeing with Proudhon that "property is theft", a recipe for totalitarianism and economic disaster.

The main legitimacy I recognize is that of prescription, a.k.a. adverse possession -- if somebody has been holding political power or real property for a long time without sustained protest, they have gained property rights to it. The time period for holding without protest is shorter for economic than political property, as it is usually much easier to protest unjust holding of the former than of the latter.

2:08 PM

nick said...

Daniel: *how (and where) does he propose to conduct experiments with such things?*

This is a tough one, because one needs to be somewhere without a superior legislature that effectively claims legislative sovereignty. A "grant" that can be revoked at the whim of a legislature is not really a grant, not a property right, just a revocable delegation. With a political property right only a *quo warranto* trial before an independent judge and jury for aggregious and repeated breaches of procedure should be grounds for forfeiture.

There was a good discussion of the sovereignty vs. property rights problem during the American Revolution by Samuel Adams (yes, the guy on the beer bottle). The Massachusetts legislature was defending its political property rights under their colonial charter from the claims by Parliament of sovereign power. Sovereign powers cannot credibly commit to protect property rights, especially not the ones they most covet, like political property rights and "commanding heights" industries. It's no surprise that legislative sovereignty combined with voting by those who owned little or no property soon led in most places to de facto or de jure nationalization of "commanding heights" industries like heavy industry and health care. Sovereign governments cannot credibly commit to protect from themselves property rights they covet.

Unfortunately, the same kind of problem had occurred with the legislatures Adams defended vis-a-vis the political property rights held by others within the jurisdiction of said legislature. (A rich culture of courts baron, courts leet, views of frankpledge, etc. in colonial Maryland ended up being destroyed by the Maryland legislature, for example).

In theory the Takings Clause should apply to political as well as economic property. But even modern defenders of the Takings Clause like Justice Scalia seem to define, in the Romanist manner, "property" as economic property only.

So find "us" someplace without a sovereign government, or some place with a strongly enforced Takings Clause that includes political property, and there "we" can do "our" experiments. :-)

2:34 PM

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